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Supreme Court of the United States

OCTOBER TERM, 1967

No. 1023

SOUTHERN CONSTRUCTION COMPANY, INC., ET AL
Petitioners

versus

GENERAL ELECTRIC COMPANY
Respondent

PETITION FOR CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners, Southern Construction Company and Continental Casualty Company, seek certiorari to review the judgment of the Court of Appeals for the Fifth Circuit in this case. In support of their petition, they respectfully show:

OPINIONS BELOW

The District Court rendered two opinions in favor of petitioners. The second affirmed the first after a rehearing. They are reported at 229 FS 873 and 236 FS 742 (WD La-1964).

The opinion of the Court of Appeals, reversing for respondent, is reported at 383 F2d 135 (CA 5-1967).

JURISDICTION

The Court of Appeals' judgment is dated August 28, 1967, and was entered the same date. Its order denying rehearing is dated and was entered on October 16, 1967. Jurisdiction of this Court lies under 28 USC § 1254(1).

QUESTION PRESENTED

In 1959 Congress amended the Miller Act's § 270b, but only in Subpart (b), to change the beginning of the one-year suit-filing period from the date certified by the Comptroller General for "final settlement of the contract" to the day when "the last of *the material*" was supplied by the claimant. 40 USC § 270b(b).

That amendment did not alter companion Subpart (a), which had always provided that the Act's 90-day pre-suit waiting and notice periods commence on the date when "the last of *the material for which such claim is made*" was supplied by the claimant. 40 USC § 270b(a).

The issue here is whether this newest mention of "*the* material" in amended Subpart (b) refers solely to the very same "material" first mentioned in unchanged Subpart (a), viz., that "for which such claim is made," thereby giving Congressionally-intended uniformity to the manner of beginning all three of the Act's limitation periods as stated by the Ninth Circuit and held by two district courts (including the lower court in the instant case); or whether, as the Fifth Circuit held in reversing the district court in this case, such new language in Sub-

part (b) means *any* material supplied by the claimant to the project, even material previously paid for and therefore not claimed in the suit, thus frustrating the amendment's uniformity purpose by leaving the start of the one-year period as divergent from that of the 90-day periods as it ever was under the pre-amendment "final settlement" criterion.

STATUTE INVOLVED

40 USC § 270b (part of the Miller Act) provides:

"(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after *the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made,* shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: *Provided, however,* That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from *the date on which such person did or performed the last of the labor or furnished or supplied the last of the ma-*

terial for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons."

"(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after *the day on which the last of the labor was performed or material was supplied by him.*[1] The United States shall not be liable for the payment of any costs or expenses of any such suit." (emphasis added)

STATEMENT OF THE CASE

Respondent supplied materials over a 5-month period to Mojave, a subcontractor on a Miller Act project located within the Western District of Louisiana, Shreveport Di-

[1] The 1959 amendment substituted this italicized phrase for the words, "the date of final settlement of such contract." Act of August 4, 1959, P.L. 86-135, §1, 73 Stat. 279.

vision. Petitioners, respectively, are the prime contractor and surety on the statutory payment bond. Mojave ultimately defaulted, abandoning its work and leaving unpaid its account with respondent.

The last materials supplied by respondent to Mojave, before the default, were delivered to the site on March 30, 1960, and the next-to-last such materials were furnished there on March 8, 1960. R 66-68.

Right after the default, completion of Mojave's work was arranged through another subcontractor, Evans, who arranged, with respondent's express written consent, to transfer from Mojave's unpaid account to Evans' own new account, the charge for all the last materials furnished on March 30, 1960; and two months later, on May 31, 1960, Evans paid respondent in full for them. Thereafter, the last *unpaid* materials still a proper part of Mojave's account were the ones furnished on March 8, 1960. R 68-70.

Almost ten months after Evans paid respondent for the transferred terminal materials originally furnished on Mojave's account, respondent sued petitioners on the bond, under the Miller Act, for the remaining unpaid balance of Mojave's account. That suit was filed in the lower court on March 13, 1961, more than one year after respondent furnished the last of the materials then being claimed in the suit, but within one year from respondent's supply of the terminal materials Evans paid for long before suit. R 71-72.

The District Court granted petitioners' summary judgment, dismissing respondent's suit as not being timely filed within the one-year period contemplated by the Act's amended § 270b(b). R 105-124. After a rehearing, the District Court affirmed for petitioners. R 137-146.

Respondent appealed, and the Fifth Circuit reversed. R 146-163. Petitioners sought a rehearing, but the Court of Appeals denied it. R 164-176.

ARGUMENT

Legislative history of the 1959 Miller Act amendment, though not extensive, shows that it was Congress' intent to have all three of § 270b's suit-related limitation periods commence thereafter on the basis of one uniform "last furnishing" standard, rather than having one of them controlled by "final settlement" or any other equally divergent beginning point.[2]

The Ninth Circuit so stated in *United States for use of Austin vs Western Electric Co.*, 337 F2d 568 (CA 9-1964): "[A] subcontractor is required [by part (a)] to give *notice* of his claim within 90 days from the date on which he performed the last labor or furnished or supplied the last material *for which claim is made.* He must [under part (b)] file *suit* within one

[2] 2 U.S. Code Congressional & Administrative News (1959), at pp. 1995-2000, including the Senate Judiciary Committee's favorable report, urging passage, and a supporting opinion by the Comptroller General. See pertinent excerpts in Appendix hereof, at pp. 29-32.

year from *the same date*." (337 F2d, at 572, emphasis added.) Two District Courts, including the lower court in the case at bar, have held to the same effect.[3]

The rationale of *Austin's* explanation on the point and of the other courts' decisions referred to in footnote 3, above, is that Subpart (b)'s amended clause, "one year after the day on which the last of *the* . . . *material* was supplied by him," is not self-defining or self-descriptive. It is entirely relative. It speaks only of "*the*" material, not material generally or any other particular material specifically described elsewhere in part (b). Hence, that clause does not have any meaningful application unless it refers back to the language in part (a) which mentions "material" three times in related contexts that *are* self defining. First, part (a) links "material" with the supplier "who has not been paid" for it and who therefore "shall have the right to sue . . . for the amount . . . unpaid at the time of . . . such suit." Then part (a) twice alludes to "the material *for which such claim is made*," which clearly means (especially by use of the word "such") the claim sued on for only unpaid materials.

In the instant case, the Fifth Circuit arrived at the contrary conclusion by holding that part (b) does not need any interpretation because its meaning is clear without resort to either legislative history or the comparable clauses in part (a). (383 F2d, at 138, Appendix, at pp. 15-16.)

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[3] See Appendix, at pp. 18-41. See also *United States for use of McGrath vs Travelers Indemnity Co.*, 253 FS 330 (DC Ariz-1966). While that decision was not appealed to the Ninth Circuit, if it had been, presumably it would have been affirmed on the basis of the Ninth Circuit's prior statement in *Austin*.

This technique of slavish adherence to the letter of the statute without regard to the Congressional purpose in enacting it, or to the statutory scheme of which it forms an integral part, is contrary to the statutory construction technique applied by this Court in *NLRB vs Allis-Chalmers Mfg. Co.*, 388 US 175 (1966), and by the Second Circuit in the Miller Act case of *United States for use of Bryant Electric Co. vs Aetna Casualty & Surety Co.*, 297 F2d 665 (CA 2-1962).[4]

The Fifth Circuit's anomalous holding will greatly prejudice government contractors, especially small ones who, because of limited bonding capacity, usually cannot obtain further bonds on new jobs until after all liability on their existing work has terminated. And if there is any other material furnished or work performed after completion of a job (as for example on

[4] *Bryant* concerned only the jurisdictional (not the peremptive) clause of Subpart (b), which expressly restricts Miller Act suits to "the United States District Court for any district in which the contract was to be performed and executed *and not elsewhere*" (emphasis added). The job had been in Labrador where there are no United States District Courts, so the suit was filed in New York. Notwithstanding the statute's clear provision against such jurisdiction, the Second Circuit in *Bryant* interpreted Subpart (b) by reading into it words which simply are not there, either expressly or impliedly, and holding: "The language of § 270b(b) is unequivocal; actions are to be brought in the. . .district of performance 'and not elsewhere' . . . ." (297 F2d, at 667, n. 1) "[But]. . .It would be ironic indeed to find in [amended part (b)] a provision which in today's world would scuttle a major part of the bonding scheme. . . . We cannot accept a construction which would lead to such a result. . . . *The literal wording of the Miller Act cannot be invoked to defeat its manifest purpose.* . . . We must therefore read the limit of § 270b(b) on the place of suit as *pro tanto* inapplicable in those instances in which there exists no United States judicial district wherein the contract is to be performed. . . ." (297 F2d, at 668-669, emphasis added).

guaranty and corrective call-backs) for which no payment is due and hence no claim is ever made, but yet, under the Fifth's Circuit decision here, that suffices to extend for more than a year the time for filing suit on the last material or work for which claim is made, then it would seem that liability on bonds would not be considered terminated by sureties until all guaranty provisions of the contracts have been fulfilled.

In view of the large volume of Miller Act cases, it is obviously of great practical importance to the safe termination of exposure to liability and the expeditious disposition of litigation by the lower federal courts, that the inter-Circuit conflict as to exactly what "last furnishing" commences the one-year suit-filing period be resolved promptly by this Court.

CONCLUSION

When Congress amended the Miller Act's § 270b in 1959, it sought to provide one uniform "last furnishing of material" basis for commencing the two 90-day limitations in part (a) and the one-year peremption of part (b), thereby eliminating all the confusion and uncertainty for suppliers, contractors and sureties which they formerly experienced under the old "final settlement" standard. But that Congressional intent is being frustrated and a new area of comparable confusion has arisen from the divergent interpretations of amended part (b)'s "last furnishing" clause and its relationship to the one in part (a). Prompt resolution of this conflict and important question

of federal law is essential to proper judicial administration.

It is accordingly respectfully submitted that certiorari should be granted herein.

R. EMMETT KERRIGAN
Attorney for Petitioners

DEUTSCH, KERRIGAN & STILES
A. MORGAN BRIAN, JR.
Of Counsel

CERTIFICATE

I hereby certify that copies of the foregoing petition for certiorari have been mailed by depositing same in a United States mail box, with first class postage prepaid (air mail for the one going out of this city), addressed to each counsel for respondent at his post office address as follows: Cromwell Warner, Jr., Esq. of Messrs. Meserve, Mumper & Hughes, 500 Mobil Building, 612 South Flower Street, Los Angeles, California 90017; Michael H. Bagot, Esq., 1825 Commerce Building, New Orleans 70112; and Jesse S. Guillot, Esq., National Bank of Commerce Building, New Orleans 70112. And thereby all parties required to be served herewith have been served.

New Orleans, Louisiana, January 13, 1968.

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R. EMMETT KERRIGAN

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COURT OF APPEALS' OPINION

(August 28, 1967.)

Before JONES and BELL, Circuit Judges, and BREWSTER, District Judge.

BREWSTER, District Judge: This suit was brought under the Miller Act against a federal construction job prime contractor and its payment bond surety to recover for the benefit of a materialman an unpaid balance due by a defaulted subcontractor for electrical materials furnished for use in the project. The sole question involved is one of law: Does the one year limitation period set out in 40 U.S.C.A., Section 270 b (b) begin to run against a materialman from the date of supplying the last material for use in the project, or from the date of supplying the last material *for which claim is made*? The trial court was of the opinion that the latter date applied, and denied recovery by a summary judgment upon the theory that the claim was barred by limitation. We disagree with that decision and reverse the judgment.

The facts were fully developed by admissions, affidavits and stipulations, and they are undisputed. They will be outlined only generally herein, as they are set out in detail in the opinions of the able trial judge reported in 229 F. Supp. 873 and 236 F. Supp. 742.

The United States entered into a contract on August 6, 1959, with Southern Construction Company, Inc. for the construction of a Nike-Hercules defense facility near

Barksdale Air Force Base in Louisiana. Continental Casualty Company was the surety on the statutory payment and performance bonds furnished by Southern in compliance with the obligations imposed on it as prime contractor under the Miller Act.

Southern subcontracted all electrical work on the project to Mojave Electric Company by written contract dated September 22, 1959. Mojave performed its work until it went broke and defaulted in March, 1960. Southern took over the electrical work for a short period until it entered into a subcontract with Evans-Jones Electric, Inc. on April 12, 1960, for completion of the work Mojave had agreed to do. General Electric Company, the use plaintiff in this suit, supplied the electrical material for the project during all stages of the electrical work. A mistake in bookkeeping during the changeovers from Mojave to Southern to Evans-Jones gave rise to the question that we are called upon to decide.

The electrical materials General Electric furnished to Mojave for use in the project were carried on open account. All the invoices to Mojave covering those materials are dated consecutively throughout November and December, 1959, and January, February and part of March, 1960. The last invoice listed on Mojave's account with General Electric is numbered 5010, and is dated March 14, 1960. It shows the sale of twelve cast iron boxes and some incidentals for $1,977.74. The materials covered by invoice #5010 reached the jobsite in two deliveries, one on March 21, and the other on March 30, 1960. They were the only materials General Electric de-

livered to the jobsite for Mojave later than March 13, 1960. It was during the time those materials were in transit that Mojave suffered the financial collapse and abandoned its subcontract with Southern. Aside from a credit adjustment shown on the account, Mojave never made any payment to General Electric for materials furnished it for the project.

When General Electric learned of Mojave's default, it acted promptly to protect itself under the Miller Act. On March 15, 1960, it sent registered letters to Southern and to Continental, enclosing a formal notice of claim and an itemized statement of the Mojave account showing a balance due of $11,369.39. Invoice #5010 was the last item shown on the account. The form and the timeliness of the notices are not questioned.

Shortly after Mojave's default, it was arranged between Southern and General Electric for a new account to be opened directly with Southern so that critical electrical materials already on order could be promptly received on the job while Southern was winding up details for a new subcontractor to take over and complete the work Mojave had abandoned.

The subcontract dated April 12, 1960, between Southern and Evans-Jones for completion of the electrical work on the job, expressly provided that Evans-Jones pick up on its own account and pay for General Electric's invoice #5010. General Electric received prompt notice of that agreement, and wrote a letter on April 18, 1960 consenting thereto. Evans-Jones made a payment to

General Electric on May 31, 1960, which completely covered invoice #5010 and other items not material here.

Although invoice #5010 was changed to the Evans-Jones account on the books of General Electric around the middle of April, 1960, General Electric inadvertently failed to remove it from the itemized statutory claim against Southern and Continental, and continued to carry it as the last item on its statement of the unpaid Mojave account.

During the period from April to September, 1960, Evans-Jones continued to receive materials from General Electric for use in the job. The materials were carried by General Electric on the Evans-Jones account, and were paid for in due course.

The present action was filed on March 13, 1961. The $11,369.39 claimed to be due General Electric on the Mojave account included the materials listed on invoice #5010. General Electric's motion for summary judgment, filed on September 6, 1962, still sought to recover on the account listing invoice #5010 as the last item. On February 21, 1963, General Electric filed corrective affidavits in support of its motion for summary judgment revealing for the first time its mistaken belief that the #5010 invoice had not been paid. The affidavits disclosed further that the amount of its unpaid balance was the same, even after the elimination of invoice #5010, because a different invoice for materials furnished Mojave for the job prior to March 13, 1960, in an amount identical to that on #5010, had been inadvertently omitted from the statutory claim.

40 U.S.C.A., Section 270 b (b),[1] the limitation statute here involved, provides that no suit by a person who has furnished labor or material for a project covered by the Miller Act "shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied by him." The trial court resorted to canons of construction to determine the meaning of the statute, and, after considering its legislative history and construing the statute in *pari materia* with Section 270 b (a), concluded that the words "for which claim is made", should be read into Section 270 b (b) to carry out the true congressional intent. We differ with that decision for the reasons that follow.

As we view Section 270 b (b), there is nothing ambiguous or doubtful about the language, "after the expiration of one year after the day on which the last of the labor was performed or material was supplied" by the claimant. There is, therefore, no occasion to resort to the legislative history of the statute,[2] or to the rule of con-

[1] 40 U.S.C.A., Section 270 b reads in its entirety: . . . [text omitted because already set out in Petition, above, at p. 3]

[2] Ex parte Collett, 337 U. S. 55, 61, 69 S.Ct. 944, 93 L. ed 1207, 1211, 10 ALR 2d 921; United States v. Public Utilities Commission, 345 U.S. 295, 314, 73 S.Ct. 706, 97 L. ed. 1020, 1037. The *Collett* case says at p. 61 of 337 U.S., and at p. 1211 of 83 L. ed: "Petitioner's chief argument proceeds not from one side or the other of the literal boundaries of #1404(a), but from its legislative history. The short answer is that there is no need to refer to the legislative history where the statutory language is clear. 'The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction.' Gemsco, Inc. v. Walling, 324 U.S. 244, 260, 89 L. ed 921, 933, 65 S.Ct. 605 (1945). This canon of construction has received consistent adherence in our decisions."

struction in *pari materia*.[3] The court must give effect to the plain and obvious meaning of the statute without reading in or reading out.[4] When that is done, we conclude that this suit, brought within the one year period following the day on which the last material was furnished, was timely filed. This conclusion is consistent with the overall remedial purpose of the Miller Act to provide broad protection for persons supplying labor and material for the construction of federal public projects.[5]

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[3] ". . .(T)he rule of *pari materia* is resorted to only in cases where the meaning of a statute is ambiguous or doubtful. . ." Northern Pacific Ry. Co. v. United States, 7 Cir., 156 F. 2d 346, 350 (1946), affirmed, 330 U. S. 248, 67 S.Ct. 747, 91 L. ed. 876.

[4] We do not mean to imply that our interpretation of Subdivision (b) would be different if it were construed in the light of its legislative history and in *pari materia* with Subdivision (a). A discussion of the legislative history would unduly lengthen this opinion; but suffice it to say that such history shows that Subdivision (b) as it now stands, and as it read from the time of its passage in 1938 until it was changed to its present form by amendment of August 4, 1959, has always had a different purpose from Subdivision (a). If we were to consider the two subdivisions in *pari materia,* we would apply the rule that in the absence of a clear intent to the contrary, "(W)here a statute with respect to one subject contains a given provision, the omission of such provision from a similar statute is significant to show a different intention existed. . ." 82 C.J.S., p. 813. City of Port Hueneme v. City of Oxnard, 52 C. 2d 385, 341 P. 2d 318; State v. Welkos, 14 Wis. 2d 186, 109 NW 2d 889.

[5] Standard Accident Ins. Co. v. United States, 302 U.S. 442, 444, 58 S.Ct. 314, 87 L. ed. 350, 351.

We cannot believe that Congress intended Section 270 b(b) to be inconsistent with the remedial purpose of the Miller Act recognized in the above cited case and in many others following it. If the construction of Subdivision (b) contended for by appellees were accepted, the prime contractor or his bonding company could set the date in many cases for the beginning of the one year limitation period by paying the charges for the last labor or material furnished. If the balance of the claim were based on labor performed or materials furnished more than a year before the payment, it would be barred by the one year limitation period.

The judgment is reversed and the case is remanded with instructions to enter summary judgment in favor of General Electric.

COURT OF APPEALS' JUDGMENT

Before JONES and BELL, Circuit Judges, and BREWSTER, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed, and that this cause be, and the same is hereby remanded to the said District Court with instructions to enter summary judgment in favor of General Electric Company;

It is further ordered and adjudged that the appellees, Southern Construction Company, Inc., and others, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

August 28, 1967

Issued as Mandate:

DISTRICT COURT'S FIRST OPINION

BEN C. DAWKINS, JR., Chief Judge.

This action is brought for the use and benefit of plaintiff, General Electric Company (GE), who furnished supplies for construction of the Barksdale Air Force Base Defense Area's Nike-Hercules Facilities at Bellevue, Louisiana.

[1] GE executed a contract with a subcontractor, Mojave Electric Company, Inc. (Mojave), but had no contractual relationship with the general contractor. Nevertheless, the Miller Act, 40 U.S.C. § 270a et seq., conferred upon the subcontractor's materialmen a cause of action on the payment bond required to be given by the general contractor to the Government. It is upon this bond that GE's action against the general contractor, Southern Construction Company, Inc., (Southern), and its surety, Continental Casualty Co. (Continental), is based.

A joint stipulation of facts has been submitted by the plaintiff and all defendants except the subcontractor, Mojave, which is bankrupt and has not contested the validity of plaintiff's claim against it. The case is submitted on cross motions for summary judgment based upon the pleadings, affidavits, and stipulated facts.

For the reasons here assigned, we conclude that plaintiff has no right of action against Southern and its surety, Continental, or the subcontractor's surety, National Union Indemnity Insurance Company (Indemnity). It is stipu-

lated that National Union Insurance Companies and National Union Fire Insurance Company were not sureties of the subcontractor and had nothing to do with the job involved.

Section 270b(b) of Title 40 U.S.C. provides:

> "Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied by him. The United States shall not be liable for the payment of any costs or expenses of any such suit."

[2] Commencement of an action within the time limitation stated under §§ 270a-270d of 40 U.S.C. is a condition precedent to an action by a materialman seeking recovery under the Miller Act. United States For the Use of Soda v. Montgomery, 253 F.2d 509 (3 Cir. 1958). Plaintiff filed this suit on March 13, 1961. The only material supplied to Mojave Electric Company for this job on or after March 13, 1960, was that item listed on GE's account as Register No. 7598-5010-B (hereinafter called #5010).

[3] In connection with item #5010, the stipulation provided:

"Following MOJAVE's default and abandonment of its subcontract work, SOUTHERN and GE negotiated an arrangement whereby SOUTHERN would pick-up and re-order on its own purchase orders all materials which MOJAVE had already ordered but which had not yet been delivered and billed by GE, or necessary materials not yet even ordered by MOJAVE, and GE would sell and invoice these on open account directly to SOUTHERN. Written confirmation of this arrangement was made by SOUTHERN's March 25, 1960 letter to GE, typed by GE on its own stationery in its own office where SOUTHERN signed it * * *.

* * * * * *

"However, on April 12, 1960, SOUTHERN entered with now-dismissed defendant EVANS-JONES ELECTRIC, INC. (hereinafter called 'EVANS') into a new subcontract, for completion of MOJAVE's abandoned work, which *inter alia* provided in pertinent part as follows:

"'*ARTICLE I. Scope of the Work.* Evans-Jones shall take and complete the sub-contract (of Mojave) * * * and shall furnish all the materials * * * required thereunder * * *.

"'Evans-Jones shall have no liability for payment of any claim for * * * materials incurred by Mojave * * * on account of that part of the subcontract already done by it, *except that Evans-Jones shall pay for all materials which have been ordered, or which are now being processed, or which*

are now in transit, and specifically the following items:

* * * * * *

"'General Electric Invoice No. 7598-5010B dated March 14, 1960 covering 6 cast iron boxes only per drawing 8332-DT and 6 cast iron boxes only per drawing 8333-DT and 12 covers, gaskets, and screws for boxes in amount of $1,977.74.' (emphasis added)

* * * * * *

"Said completion subcontract was separately bonded for $104,000 to SOUTHERN by EVANS with The Travelers Indemnity Company as surety on that bond * * *.

* * * * * *

"On April 13, 1960, SOUTHERN notified GE of the take-over by EVANS, that part of the previous order-pick-up arrangement by SOUTHERN was superceded [*sic*] by EVANS' new order-pick-up agreement as specified in said completion subcontract, and that GE should commence selling and invoicing such orders directly to EVANS on its own separate open account. * * *

* * * * * *

"GE consented to this and wrote EVANS on April 18, 1960, confirming that invoice #5010 in the amount of $1,977.74 was being shifted from MOJAVE's account to a new account with EVANS. * * *

* * * * * *

"Subsequently, GE actually did transfer invoice #5010 to its new account with EVANS * * *.

* * * * * *

"On May 31, 1950, EVANS paid GE in full for invoice #5010 * * *."

Since the action against Southern and Continental was not brought within a year after supplying the last material *for which claim is made,* it must be dismissed.*

[4] Even though plaintiff forfeited its rights against the prime contractor by failure to bring suit within the time required by statute, it is possible that a claim still existed against the subcontractor and its surety upon the conventional payment and performance bond which Southern required Mojave to furnish. The bond provided in pertinent part as follows:

"* * * MOJAVE ELECTRIC COMPANY, as Principal, and NATIONAL UNION INDEMNITY COMPANY, as Surety, are held and firmly bound unto SOUTHERN CONSTRUCTION CO., INC., Augusta, Georgia, in the sum of ONE HUNDRED SEVENTEEN THOUSAND, SEVEN HUNDRED AND SEVENTY SIX AND NO/100 DOLLARS ($117,776.00), for the payment of which sum, well and truly to be made, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

"The condition of this obligation is such that whereas the Principal has entered into a certain subcon-

* See Appendix, in which defendant's counsel very ably has analyzed 40 U.S.C. § 270b.

tract, hereto attached, with Southern Construction Company, Inc., dated SEPTEMBER 22, 1959.

"Now, if the said Principal shall well and truly perform all of the work and furnish all the labor and materials required by said subcontract, and any changes or additions thereto which may hereafter be made, and shall perform all the undertakings stipulated in said subcontract, and shall promptly make payment to all persons supplying labor and materials in the prosecution of the work provided for in said subcontract, then this obligation to be void; otherwise to remain in full force and effect.

"No extension of time given to the said Principal for the performance of said subcontract, and no change in said subcontract shall release the Surety hereon."

In researching the jurisprudence for cases involving interpretation of a similar agreement, we find that this is one of those rare instances in which there exists an appellate decision of a case which is almost on "all fours" with this one; namely, Socony-Vacuum Oil Co. v. Continental Casualty Co., 219 F.2d 645 (2 Cir. 1955). There the court noted that state law controls interpretation of a conventional suretyship agreement. It applied Vermont law and concluded that since the prime contractor had required the subcontractor to obtain a payment bond conditioned upon the payment of all laborers and materialmen, the bond provided protection for them. The court criticized the decision in McGrath v. American Surety Co. of New York, 307 N.Y. 552, 122 N.E.2d 906

(1954), in which it was held that a materialman had no right of action against a surety of a subcontractor under a similar private bond.

[5] The Socony-Vacuum decision reached an equitable result, which we would be inclined to follow but for the fact that Louisiana courts have adopted a position similar to that pronounced in McGrath. In Louisiana only the named obligees on such conventional contractor's bonds, not third party materialmen, may recover from the surety on the bonds. Carolina Portland Cement Co. v. Carey & Boettner, 145 La. 773, 82 So. 887 (1919); State v. C. S. Jackson & Co., 137 La. 931, 69 So. 751 (1915); Lhote Lumber Mfg. Co. v. Dugue, 115 La. 669, 39 So. 803 (1905); Hughes v. Smith, 114 La. 297, 38 So. 175 (1905); and Salmen Brick & Lumber Co. v. LeSassier, 106 La. 389, 31 So. 7 (1901).

[6] Although the correctness of the Louisiana position under modern civil law theory has been questioned, Smith, Third Party Beneficiaries in Louisiana: The Stipulation Pour Autrui, 11 Tul.Law Rev. 18, 35-47 (1936), unless and until the Louisiana Supreme Court alters its position, we are bound to follow it. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). Therefore, the action against Southern, Continental and Indemnity will be dismissed.

A proper decree shall be presented.

APPENDIX

From Defendants' Memorandum Brief of July 30, 1963, pp. 8-15:

"That part of the Miller Act applicable to a materialman's action against prime and surety on the statutory payment bond is found in 40 USC § 270b, and consists of two subparts of its own, (a) and (b), stating in pertinent part as follows:

> "'(a) * * * every person who has furnished * * * material * * * who has not been paid in full therefor before the expiration of a period of 90 days after the day on which the last of the * * * material was furnished or supplied by him *for which such claim is made,* shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute their action to final execution and judgment for the sum or sums justly due him; provided, however, that any * * * (remote materialman) * * * shall have a right of action upon giving written notice to said contractor within 90 days from the date on which such person * * * furnished or supplied the last of the material *for which such claim is made* * * *.
>
> "'(b) * * * Every suit instituted under this section shall be brought * * * in the United States District Court * * * but no such suit shall be commenced after the expiration of *one year after the day on which the last of the * * * material was supplied by him.* * * *' (Emphasis added)

"The foregoing (current) version of this part of the Miller Act results from the Act's latest amendment which was enacted by the 86th Congress as Public Law 135 (73 Stat. 279). That amendment became effective on August 4, 1959, and is expressly applicable to all federal construction jobs covered by prime contracts dated thereafter. Since SOUTHERN's prime contract with the Government for the job here is dated August 6, 1959, two days after the amendment's effective date, the foregoing amended version of the Act (rather than the pre-amendment version) applies to the prescriptive issue now presented here at bar.

"It is highly significant that the 1959 amendment changed only subpart (b), not subpart (a).

"The '(a)' subpart for some time had referred to the same two separate and distinct 90-day periods which are preserved in the foregoing amended version. They were not altered in the least by the 1959 amendment. The first of such 90-day periods specifically covers the question of filing and 'prematurity' of a Miller Act bond suit; i.e., such suit cannot be filed by an unpaid materialman sooner than or until 90 days after the time when the last of the particular materials '*for which (his) claim is made*' were furnished. The other 90-day period treats the matter of the prerequisite 'notice of claim' which remote materialmen must give in order to preserve their entitlement to sue on a Miller Act bond; i.e., such suit cannot be filed by a sub's (as distinguished from the prime's) materialman unless he has already sent a registered-letter-notice-of-claim to the prime during that

same period of 90 days after the time when the last of the particular materials *'for which (his) claim is made'* were furnished. Thus, both before and after the 1959 amendment, both of the 90-day periods of time referred to in subpart (a) commenced to run on exactly the same date, viz., the date of the claimant-materialman's last furnishing of the particular materials for which his suit-claim is made.

"Only the '(b)' subpart was changed by the amendment. It had always provided a 1-year prescriptive period within which materialmen's suits on Miller Act bonds must be brought. And it still does. The change wrought by the amendment occurred only in the language specifying when such 1-year period commences to run. Before the amendment, this subpart (b) provided that the year began right after the 'date of final settlement of the prime contract as certified by the Comptroller General'. This was an entirely different starting time than applied to the two 90-day periods in the pre-amendment subpart (a). But the 1959 amendment changed that 'date of final settlement' language in subpart (b) so as to provide that the 1-year suit-filing limitation would—like the unchanged 90-day periods in subpart (a)—begin to run 'after the day on which the last of the material was supplied by him' (i.e., the materialman making the claim in suit).

"Accordingly, it is evident that the amendment's only purpose was to make commencement of all the prescriptive periods in the Act uniform. Prior to 1959, the Miller Act's 90-day pre-suit-filing and 90-day notice-of-

claim periods in subpart (a) both began to run from 'date of last furnishing for which claim is made', while the 1-year suit-filing limitation in subpart (b) started running from the entirely different 'date of final settlement of the contract'. But the amendment eliminated that disparity of commencement times between the two subparts. It left subpart (a) as it was, continuing to initiate the two 90-day periods from 'date of last furnishing for which claim is made' whereas, subpart (b) was radically changed, deleting all reference to 'final settlement of contract', and having the 1-year period run instead from 'date of last furnishing'.

"It is therefore not really important that the new criterion of amended subpart (b), i.e., 'date of last furnishing', seems to be less restrictive than the older phrase still used throughout subpart (a), viz., 'date of last furnishing *for which claim is made*'. For clearly, the new and changed language of subpart (b) must be read and interpreted in *pari materia* with the long-established and unaltered expressions which Congress allowed to stand intact in subpart (a). These two subparts are closely related in their contexts. Both are portions of but a single section of the Act, § 270(b), all of which treats the sole subject of filing furnishers' suits against primes and sureties on statutory payment bonds. All three of the prescriptive limitations mentioned in § 270(b), two 90-day periods and one 1-year period, have to do with filing such suits. Hence, although the exact existing words were not used in the 1959 amendment, it is implicit in the overall context of the section that the new language in subpart (b) means 'date of last furnishing

for which claim is made' just as has always been true of subpart (a).

"It would be completely unrealistic to assume that Congress intended its new 1959 standard, 'date of last furnishing', to mean something quite different from the retained pre-amendment concept, 'date of last furnishing *for which claim is made'*. This would be tantamount to saying that, although Congress intended for its amendment to correct the previous disparity of starting times between the section's two subparts, it foolishly failed to accomplish that result because the non-conforming criterion was replaced with a new standard which is just as incongruous as the original maverick which had caused the disparity in the first place.

"That Congress intended no such self-cancelling action is vividly shown in the legislative history of its 1959 amendment to the Miller Act. See 2 U.S.Code Congressional & Administrative News (1959) at pp. 1995-2000, which includes the Senate Judiciary Committee's favorable report on the bill, urging its passage by Congress, and a supporting opinion from the Comptroller General.

"The Senate Judiciary Committee's report characterized the proposed amendment as one designed 'to eliminate all responsibility of the Government for fixing dates on which the period of limitation for filing suits against Miller Act payment bonds commences to run' (p. 1995). Its 'purpose' is stated succinctly as being merely 'to relieve the Comptroller General of the re-

sponsibility for fixing the date on which the statute of limitations commences to run in certain suits under the Miller Act' (p. 1995). In pertinent part, the Committee's report says:

> " 'This proposed legislation has been recommended to Congress by the Comptroller General * * *. It deals with an administrative problem that has arisen under the Miller Act * * * which establishes performance and payment bonding requirements for most Federal construction contracts. Under present law a person who has not been paid in full for * * * material within 90 days after the last * * * material (was) furnished may sue on the payment bond. The time within which a suit may be instituted against the contractor under the payment bond requirements for * * * material supplied will be changed from the present statutory requirement of one year after the "date of final settlement of such contract" as certified by the Comptroller General to one year after the "day on which the last of the * * * material (was) supplied by him." (p. 1995)
>
> * * * * * *
>
> " 'The determination of the date of final settlement has involved an ever-increasing administrative burden on the Comptroller General. It has further been complicated by court decisions that have liberally construed the term "labor and material". In applying the criteria the determination is often reached without knowledge or agreement on the part of the contractor.

"'The change in the law recommended by the Comptroller General will place every * * * supplier of materials on an equal basis. Those supplying * * * material in the first stage of the contract will be subject to the same 1-year period within which to institute suit as those * * * supplying materials in the last stages of the contract. The supplier * * * would also know simply by consulting his records the precise time when the one limitation began to run and (by adding one year) when his right to sue would expire.

* * * * * *

"'The proposed change in the law would result in material savings to the Government when the expenses of the Comptroller General and those agencies having charge of the contract are taken into consideration.

"'The Committee feels that the proposed legislalation is most meritorious. It will not only result in savings in administrative costs to the agencies, but it will also provide for those entilted to sue under payment bond requirements of the Miller Act a simple, fixed, and certain method for determining the period within which the suit must be filed. It is, therefore, recommended that the bill be favorably considered.' (p. 1996)

"And, significantly, the Comptroller General's opinion supporting adoption of the amendment points out that:

"'Amendment of the Miller Act in this fashion would eliminate all responsibility of the Government

for fixing the date at which the period of limitation commences to run. At the same time, no difficulties would be placed in the way of claimants under the payment bonds, since they already are required to establish *identical dates* in connection with accrual of their rights to sue. In fact, they undoubtedly will benefit from the elimination of effort and concern in establishing "final settlement" dates.' (p. 1999, emphasis added)

"From the foregoing, and especially the reference to '*identical dates*', it is obvious that the intent of both Congress and those who sponsored and pushed through the 1959 amendment was to have the date on which the 1-year period in subpart (b) commences to run changed so as thereafter to be *identical* to the already-established common date on which both 90-day periods in subpart (a) had all along been commencing to run. And that uniform starting date was then and still is 'the date of last furnishing of materials for which claim is made'!

"So, notwithstanding Congress' failure, in amending subpart (b), to repeat for a third time in the same short section the qualifying words 'for which claim is made', which if done would have been a burdensome redundancy, the legislative history of this amendment shows that Congress fully intended for its new language in subpart (b) to be understood as meaning exactly that, just as its previous language in subpart (a) expressly says in two separate places. Congress merely used in (b) a shortened version of the same phrase stated in its fullest details in (a).

"Exhaustive research has revealed no cases construing this point, nor even generally interpreting the phrase 'for which claim is made' as used in either the (a) or (b) subparts, either before or after the amendment. It appears to be an issue of first impression in the instant matter, with no guiding precedent available for the Court's assistance. But the legislative intent is strongly shown to favor moving defendants' position that Section 270(b) (b) of the Miller Act, as amended in 1959, requires that a materialman's suit against the prime and surety on the statutory payment bond must be filed within one year after the date on which that same materialman last furnished the particular materials for which he is claiming payment in the suit so filed. This Court should so hold. Cf: US for Weithman vs Buckeye Union Cas. Co.*

"*A fortiori*, any portion of the materials originally so furnished but subsequently paid for in full cannot possibly—after such payment and much later at the time of filing suit—be considered part of the particular materials for which claim is then (i.e., in the suit) being made. This Court should so hold on that point also.

"When the foregoing legal principles compelled by the governing statute are applied to the undisputed facts of this case, it is readily apparent that GE's suit at bar was filed too late. It was not filed within one year of

* "207 FS 552 (ND Ohio-1962), construing the amended subpart (b) narrowly and holding that materials furnished by someone else cannot establish the date of last furnishing by the particular supplier whose suit must be filed within one year of his own last furnishing, even though the other party's furnishing was for that supplier's benefit.

the date on which GE last furnished the paricular materials for which it seeks payment herein, or, in the applicable language of the statute, 'for which claim is made' by GE."

DISTRICT COURT'S SECOND OPINION

BEN C. DAWKINS, Jr., Chief Judge.

This action is brought for the use and benefit of plaintiff, General Electric Company (GE), a furnisher of materials used in the construction of the Barksdale Air Force Base Defense Area's Nike-Hercules Facilities at Bellevue, Louisiana.

Defendant, Southern Construction Company (Southern), entered into a contract with the federal government's Corps of Engineers to construct the proposed facilities and posted the performance and payment bonds required by the Miller Act, 40 U.S.C.A. § 270a et seq., with Continental Casualty Company (Continental) as surety. Southern then subcontracted with Mojave Electric Company (Mojave) for performance of the electrical work on the project. During the course of the work on the project Mojave bought materials on open account from GE, and these materials were shipped to the site of the work by GE.

Mojave performed its work under the subcontract and received materials from GE until March 1960, when it defaulted and abandoned the subcontract work, leaving its account with GE unpaid. The last materials shipped

by GE to Mojave, identified by invoice #5010, were ordered by Mojave October 22, 1959. Although the materials in invoice #5010 were shipped by the specialty manufacturer March 8, 1960, the invoice from GE for this item was dated March 14, 1960, and part of the material in this item was received at the jobsite March 21, 1960. The remainder was received at the jobsite March 30. None of the other materials furnished by GE to Mojave were received on the jobsite after March 13, 1960. GE sent by registered mail March 15, 1960, a "notice of claim" and an itemized statement of the Mojave account, including invoice #5010, in the amount of $11,369.39.[1]

March 25, 1960, after Mojave's default, Southern and GE confirmed an agreement whereby Southern "would pick-up and re-order on its own purchase orders all materials which MOJAVE had already ordered but which had not yet been delivered and billed by GE, or necessary materials not yet even ordered by MOJAVE, and GE would sell and invoice these on open account directly to SOUTHERN."[2] Southern then entered into a new subcontract April 12, 1960, with Evans-Jones Electric, Inc. (Evans) for the completion of Mojave's abandoned work. That agreement provided, *inter alia*, that Evans would pay for certain items, including the materials on invoice #5010. GE consented to this agreement and wrote

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1 From this notice of claim was omitted inadvertently invoice #4674 dated March 4, 1960. This invoice was in the identical amount as invoice #5010—$1,977.74. The materials represented by invoice #4674 were received on the jobsite March 8, 1960.

The amount claimed in this suit was the same as the amount claimed in the notice of claim—$11,369.39. At the time of the suit invoice #5010 had been paid by Evans but this amount still represents the total amount of the claim after invoice #4674 properly is added to the account.

2 Quoted from the Joint Stipulation of Facts filed August 2, 1963.

Evans April 18, 1960, that #5010 was being transferred to Evans' account. This transfer was made and Evans paid GE in full for #5010 May 31, 1960.[3]

40 U.S.C.A. § 270b(b) provides:

> "Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, *but no such suit shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied by him.* The United States shall not be liable for the payment of any costs or expenses of any such suit." (Emphasis added.)

[1, 2] The time limit provided in this section for the institution of suit is a limitation on the liabilty itself, and not of the remedy alone. It is a condition precedent to the institution of the suit that it be brought within the one-year time limit provided. United States for Use of Soda v. Montgomery, 253 F.2d 509 (3 Cir. 1958); Travis Equipment Co. v. D. & L. Construction Co. & Associates, 224 F.Supp. 410 (W.D.Mo.1963); United States v. Seaboard Surety Co., 201 F.Supp. 630 (N.D.Texas 1961); United States for Use of M. A. Hartnett, Inc., v. Enter-

[3] From April through September 1960 both Evans and Southern ordered materials from GE which were delivered at the jobsite. However, these materials were billed to their separate accounts with GE, and they were no part of the Mojave account.

prise Engineering & Construction Co., 169 F.Supp. 131 (D.C.Del.1958).

This suit was filed on March 13, 1961,[4] and the issue for determination is whether it was filed within the one year limitation provided in § 270b(b). Since invoice #5010 represented the only material supplied after March 13, 1960, this suit was not filed timely unless the commencement date of the one year period within which to file suit was the date #5010 was charged[5] or delivered[6] to Mojave. We have previously held that the suit was not filed timely (229 F.Supp. 873), but in the present motions plaintiff seeks a reversal of that decision insofar as it applies to Southern and its surety, Continental.[7]

In our prior opinion we approved the analysis of 42 U.S.C.A. § 270b(b) propounded by counsel for defendant in which he concluded that this section, read in *pari materia* with the language of § 270b(a)[8] and the legislative history of the 1959 amendment to § 270b(b),[9] requires that a materialman's suit against the principal contractor and surety on the payment bond must be filed within one year from the date on which that same ma-

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4 Although the suit was filed with the Clerk at this time, by request of counsel for plaintiff service was withheld until further information was furnished the Clerk by plaintiff's counsel. This information was furnished by letter dated May 4, 1961, and service was accomplished shortly thereafter.

5 March 14, 1960.

6 March 21 and March 30, 1960.

7 Plaintiff does not contend there was any error in dismissing the suit as to National Union Indemnity Insurance Company. Mojave is bankrupt and has not contested the validity of plaintiff's claim against it.

8 40 U.S.C.A. § 270b(a): . . . [text omitted]

9 See 229 F.Supp. 873, 876 (1964).

terialman last furnished the particular materials for which he claims payment in the suit.

Plaintiff strenuously objects to that holding and to the analysis of the statute we have adopted. It contends that the result of that reasoning would be to have an identical date for the commencement of three periods: (1) the 90 day period during which notice must be given to the prime contractor;[10] (2) the 90 day period which must expire before the suit can be brought against the prime contractor;[11] and (3) the one year period in which suit must be brought.[12] It further contends that under defendant's analysis and our prior decision the effect of the transferral of invoice #5010 to Evans' account and the payment of this account by Evans was to shorten the one year period within which to file suit after it had begun to run. GE concludes that, rather than applying identical dates to the 90 day periods and the one year period, defendant's argument results in the application of different commencement dates for these periods.

GE contends that after Mojave defaulted in March, 1960, it consulted its records and found the date of the last invoice (#5010) to be March 14. Assuming this date to be the commencement date of the 90 day periods and of the year within which to file suit, GE gave the March 15 notice to Southern of the existence of its claim against Mojave well within 90 days of the assumed commence-

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10 See note 8 supra.
11 Ibid.
12 40 U.S.C.A. § 270b(b).

ment date.[13] GE's assumption of this commencement date is the basis for its conclusion that our prior decision applied a different starting date for the one year prescriptive period. However, the commencement date for the two 90 day periods is not at issue here. We, therefore, are not called upon to express an opinion as to the commencement date of either of these 90 day periods.[14] We need only decide whether in this case the one year prescriptive period commenced after March 13, 1960.

[3] After a thorough examination of plaintiff's argument, we reaffirm our prior holding that this suit must be dismissed, because it was not brought within a year after GE supplied the last material for which claim is made. Since invoice #5010 had been paid at the time this suit was brought, it formed no part of GE's claim in this suit, and the delivery of the material represented in that invoice did not have the effect of extending beyond March 13, 1960, the commencement of the one year period within which to file suit.

Plaintiff contends that such a result will permit an unscrupulous prime contractor to trap an unwary ma-

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[13] Alternatively, GE contends the commencement date was March 21, 1960, the date the first shipment of the goods represented by invoice #5010 was received at the jobsite.

[14] Counsel for both plaintiff and defendant concede that in the ordinary situation the starting date of the 90 day and one year periods would be identical, because ordinarily the creditor, instead of allowing a debtor or third person to pay off the last item on an open account, would apply any payment made on an open account to the first of the items on the account. Thus, no question would ordinarily be presented as to when the last of the material on the account was furnished. The facts before us constitute an exceptional, rather than an ordinary, situation.

terialman by paying, or by inducing a third person to pay, the last invoice on an open account just before the 90 day or one year period had run. Lest such a "device" be opened to the unscrupulous, GE suggests our prior decision be altered.

We do not think such a holding, limited to the facts before us, opens the door to collusion on the part of a prime contractor to defeat the claim of a materialman by paying or inducing a third person to pay the last invoice on an open account just before the expiration of the 90 day or one year period of limitation. We must point out here that no collusion on the part of either Southern, Continental or Evans is alleged or even intimated by the facts here presented.

The payment of invoice #5010 was not by Southern, and there is nothing to show that Southern in any way induced Evans to pay invoice #5010 in order to defeat plaintiff's claim against Southern. Moreover, since the transfer of the invoice from Mojave's account to Evans' account was with the consent of GE, there can be no contention of collusion in that respect.

In the Senate Judiciary Committee's favorable report on the 1959 amendment to 40 U.S.C.A. § 270b(b) it was said that under the amendment the supplier "would also know simply by consulting his records the precise time when the 1-year limitation began to run and (by adding 1 year) when his right to sue would expire." 2 U.S.Code Congressional & Administrative News (1959) at 1996. However, that report apparently assumed that the sup-

plier's records would reflect accurately the last material supplied by him. In this case, GE continued to list invoice #5010 on the Mojave account even after it had been transferred by the consent of all parties to the account of Evans and after it had been paid by Evans. This error by GE was in no way due to the fault of Southern, Continental or Evans.

[4] If GE's records had been kept accurately, at any time after April 18, 1960, it could have consulted these records and determined the date its right to sue expired. To extend this time limit to the date of invoice #5010 would be to extend plaintiff's one year prescriptive period because of its failure to delete that invoice from the Mojave account. We do not think plaintiff should be allowed to profit by its own mistake.

For these reasons we think the result reached in our prior decision, under the particular facts of this case, is correct. Therefore, plaintiff's motions are denied.

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IN THE

Supreme Court of the United States

October Term, 1967
No. 1023

SOUTHERN CONSTRUCTION COMPANY, INC., *et al.*,
Petitioners,

vs.

GENERAL ELECTRIC COMPANY,
Respondent.

On Petition for Certiorari to the Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION.

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BRIEF FOR RESPONDENT IN OPPOSITION.

Respondent, General Electric Company, respectfully submits the following in opposition to the Petition for Certiorari to the Court of Appeals for the Fifth Circuit:

Opinions Below.

Petitioners made correct references to the opinions below.

Jurisdiction.

Petitioners correctly stated the grounds of jurisdiction.

Question Presented.

Petitioners misstated the question presented by their application. Speaking in the language of Petitioners

and the statute involved, the suit below sought to recover the "amount, or the balance thereof, unpaid at the time of institution" of suit for "the very same 'material' first mentioned" and was commenced prior to the expiration of one year after the day on which Respondent last supplied material and prior to the expiration of one year after the day on which Respondent last supplied "the very same 'material' first mentioned in unchanged Subpart (a), viz., that 'for which such claim is made' ".

The question presented is, shall the statute involved be interpreted according to its clear meaning, or if not, shall it be interpreted so as to allow obligors upon Miller Act bonds to manipulate the duration of the limitation periods for notice and suit?

Statute Involved.

Petitioners correctly quoted the statute involved.

Statement of the Case.

Petitioners stated the case incompletely. The following facts were omitted:

(a) Respondent gave Petitioners the statutory notice required by Subpart(a) in which it properly claimed payment for the so-called terminal materials supplied on March 30, 1960. At the time of the notice Respondent was unpaid for such materials.

(b) The two ninety-day "suit-related limitation periods" prescribed by Subpart(a) in fact commenced to run on March 30, 1960.

(c) Whether the interpretation of Subpart(b) urged by Petitioners or that adopted by the Fifth

Circuit be followed, the one year "suit-related limitation period" prescribed by Subpart(b) did in fact commence to run on March 30, 1960. (See Summary of Facts in Opinion of Fifth Circuit)

Petitioners inaccurately stated the case at page 5 of their Petition. Correctly stated, the last paragraph printed on said page 5 would read:

> Almost ten months after Evans paid Respondent for the transferred terminal materials originally furnished on Mojave's account, Respondent sued Petitioners on the bond, under the Miller Act, for the unpaid purchase price of materials claimed in the statutory notice previously given pursuant to Subpart(a) of §270b. That suit was filed in the lower court on March 13, 1961, within one year after Respondent furnished the last of the materials for which claim was originally made in the said statutory notice and for which claim was then, inadvertently, being asserted in the suit, within one year from Respondent's supply of the terminal material Evans paid for long before suit, but more than one year after Respondent furnished the last of the materials for which it was then in fact unpaid. (See Summary of Facts in Opinion of Fifth Circuit)

ARGUMENT.

Petitioners' argument proceeds upon the theory that the Court should not be slave to the plain, unambiguous language of Subpart(b) of §270b. (page 8 of Petition.) They claim the statute should be construed in the light of Congressional history and *in pari materia* with Subpart(a). As the Fifth Circuit points out, conceding the argument avails Petitioners nothing. The legislative history of the statute involved and the doctirne of *pari materia* properly applied support rather than contradict the plain meaning of the language adopted by the Congress. (Footnote 4, page 16 of Petition) However, in refusing to resort to legislative history or the rule of *pari materia*, the Fifth Circuit correctly applied well established rules of law to the facts of this case and the statute involved. The holding of the Fifth Circuit is entirely consistent with the remedial purposes of the Miller Act rejecting, as it does, an interpretation which would allow prime contractors or bonding companies to manipulate the one year limitation period to the detriment of those intended to be protected by the Act. (Footnote 5, page 16 of Petition.) Certiorari is not required under such circumstances.

Petitioners would have us infer from their argument that certiorari is necessary to eliminate conflicts between the decisions of lower courts. (pages 6, 7 of Petition.) Such is not true. There is no conflict among the decisions of the lower courts on the point involved in these proceedings. Petitioners point to the holding of two District Courts (The District Court below and United States for use of *McGrath v. Travelers Indemnity Co.*, 253 F. Supp. 330 (D.C., Ariz.—(1966).) In view of the fact that the only two District

Court opinions involved are the one below and another which relied entirely on the published opinions of the court below, that error has already been corrected by the opinion of the Fifth Circuit in this cause. Petitioners also repeat a passing comment from the opinion of the Ninth Circuit in *United States for use of Austin v. Western Electric Co.*, 337 F. 2d 568 (C.A. 9-1964). The point now under consideration was not involved in the matter before the Ninth Circuit and was not the subject of either the reasoning or the holding of the Court. Simply, in light of the facts before it, the Court's observation was a truth stated in passing. There is no conflict of thought or holding between the Ninth Circuit in *Austin* and the Fifth Circuit in this cause.

A proper application of the Petitioners' quotation from *Austin* to the facts of this case demonstrates, in any event, the futility of Petitioners' argument. Petitioners quoted as follows:

> "'[A] subcontractor is required [by part (a)] to give *notice* of his claim within 90 days from the date on which he performed the last labor or furnished or supplied the last material *for which claim is made.* He must [under part (b)] file *suit* within one year from *the same date.*'"

Assuming *arguendo* that the foregoing quotation is the correct rule to be applied to the facts of this case, there remains unanswered a central issue, *i.e.*, when should the date referred to in the rule be determined, prospectively or retroactively.

One possible time for determination is the time the trouble arises. At that time a materialman can determine the nature and scope of his claim, identify the

materials for which claim is to be made, and ascertain the date on which he supplied the last of such material. He then is on notice as to the date before which he must give notice of claim (Subpart(a)) and the date before which he must sue if his notice goes for naught. (Subpart(b)) In other words, the date can be ascertained at the time of default, establishing prospectively the dates before which certain acts must occur. Another possibility is the one contended for by Petitioners. That is, the time of suit or, perhaps, even more accurately the time of trial. At that time a materialman can determine which portion of his original claim has been paid by the reluctant prime contractor or bonding company, if any, and ascertain in retrospect when he should have given his notice and when he should have commenced suit.

Respondent respectfully suggests that Petitioners "same date" argument does not further their cause. To succeed, Petiioners must convince this Court that Congress intended that all three "suit-related limitation periods" be fixed in retrospect based upon the claims successfully established at trial, not prospectively at the time of the default or claim made.

The real burden of the Petitioners' argument becomes even more graphic when it is realized that the only reason Respondent is before this Court is that it adopted a "same date" course of its own. When Mojave defaulted, Respondent prepared its claim, gave statutory notice, ascertained the date upon which it supplied the last materials for which such claim had been made (March 30, 1960). It then waited for payment properly due it from Petitioners and when payment was not forthcoming, commenced suit before the

expiration of one year from the date it supplied the last materials for which such claim had been made. Respondent finds it confusing to hear argument that its just claim ought to be forfeited because Respondent did just exactly what Petitioners assert should have been done. Respondent acted as it did at the time of the Mojave's default on March 15, 1960. Petitioners claim Respondent should have acted on May 31, 1960, retroactively, after partial payment on account in response to the statutory notice of claim given two and one-half months earlier. (or perhaps the claim is Respondent must discover at trial that it should have acted on May 31, 1960) No such requirement of hindsight can be read into Subpart(b) of §270b.

The last point argued by Petitioners claims potential hardship to small prime contractors. (pages 8, 9 of Petition.) The claimed hardship is predicted to arise out of an extension to an indefinite future date of time to assert claims under the Miller Act. The point is without merit. *United States for the use of Austin v. Western Electric Co.*, 337 F. 2d 568 (C.A. 9-1964) quoted from by Petitioners in connection with another point, supplies the answer to Petitioners' concern. There the Court was dealing with the question of the type of conduct which extends coverage of the Miller Act. To this point the Court says:

> ". . . the test to be applied is whether . . . the material (was) supplied as a 'part of the original contract' or for the 'purpose of correcting defects, or making repairs following inspection of the project'."

The Court reasoned that the supplying of material in connection with the first of the two alternatives extends

all suit-related limitation periods and the supplying of materials in connection with the second alternative extends none. The test discussed by the Ninth Circuit in *Austin* is well established and the opinion of the Fifth Circuit in this cause will not even remotely suggest the problem discussed by Petitioners when read in accord with existing law.

Conclusion.

The statute involved, in connection with the point involved, is clear and unambiguous and completely and accurately reflects the Congressional intent. The statute was properly interpreted and applied to the facts of this case by the Fifth Circuit in a well written, easily understood opinion which will afford the Bench and Bar a sound precedent for the future. Respondent respectfully urges that certiorari be denied.

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